SUPREME COURT, U. S.

PETITION FOR CERTIORARI

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1045

MELVIN LLOYD MANLEY,
Petitioner.

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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Petitioner, Melvin Lloyd Manley, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia rendered in these proceedings on September 4, 1970.

OPINIONS BELOW

The decision of the Supreme Court of Appeals of Virginia denying petitioner's appeal and affirming judgment of conviction rendered by the Corporation Court, Part Two, of the City of Norfolk, Virginia, is embodied in an opinion reported at 211 Va. 146, 176 S.E.2d 309. The opinion appears at Appendix, *infra.*

JURISDICTION

The decision of the Supreme Court of Appeals of Virginia was entered on September 4, 1970. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether an affidavit given preliminary to the issuance of a search warrant is sufficient where the facts were all stated by an unidentified informant, who is only described therein as "a reliable informant" without containing any underlying circumstances as to his credibility or the reliability of his information.

2. Whether a search warrant is valid which attempts to describe an apartment in a building to be searched only with reference to the name of a person alleged to occupy said apartment where resort must be had to sources independent of the warrant in order to ascertain which apartment in a multiple unit building was to be searched.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

that in determining whether a State criminal conviction is constitutionally permissible because of the admission of evidence obtained as a result of an illegal search and seizure, State procedural requirements must be respected.

[2] Rule 1:8, Rules of Court, provides in part that all objections requiring a ruling or judgment of the trial court shall state with reasonable certainty the ground of objection, and unless it appears from the record to have been so stated, such objections will not be considered by this court. See *Fletcher* v. *Commonwealth*, 209 Va. 636, 640, 166 S.E.2d 269, 273 (1969).

An objection that a search warrant was not supported by an affidavit as required by statute cannot be raised for the first time on appeal from a conviction. See *Harlow* v. *Commonwealth*, 195 Va. 269, 273, 77 S.E. 851, 854 (1953); *Nicholas* v. *Commonwealth*, 186 Va. 315, 324, 42 S.E.2d 306, 311 (1947). See also *Frogg* v. *Commonwealth*, 163 Ky. 175, 173 S.W. 383, L.R.A. 1915D 330 (1915).

There is a general procedural requirement in most jurisdictions that if a defendant wishes to preserve his right to challenge on appeal the constitutionality of a search and seizure through which certain evidence has been obtained, he must take timely steps in the lower court, either through a motion to suppress the evidence before trial or by sufficient objection to the use of the evidence when offered at trial. *United States* v. *Gitlitz*, 368 F.2d 501, cert. denied 386 U.S. 1038, 87 S.Ct. 1492, 18 L.Ed. 2d 602, rehearing denied, 389 U.S. 908, 88 S.Ct. 210, 19 L.Ed.2d 227 (2d Cir. 1966); 29 Am.Jur.2d, Evidence, §§ 425, 426, at 481, 483. See also Annotations: 50 A.L.R.2d 531, §§ 11, 12, at 583, 592, and 30 A.L.R. 3d 128, § 10, at 178-84, and the numerous cases there collected.

Since the defendant did not raise the question of the authority of the justice of the peace to take the affidavit of the affiant-officer in the court below, it will not now be considered by us.

[3] Defendant says that the affidavit upon which the search warrant was issued was insufficient in that it did not state the underlying circumstances constituting probable cause for the issuance of the warrant, as required by the test set out in *Aguilar* v. *Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723 (1964), and later explained and referred to as a "two-pronged test" in *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

In *Aguilar* the test for determining probable cause in those many instances where the affidavit is based solely or substantially upon an

informer's tip was set forth as follows: (1) the affidavit must describe some of the underlying circumstances necessary to enable a neutral and detached magistrate to judge the validity of the informant's conclusion that the narcotics were where he claimed they were, and (2) the affidavit must describe some of the underlying circumstances from which the magistrate can determine that the affiant, officer or unnamed informant, whose identity need not be disclosed, was 'credible' or his information 'reliable.'

Clearly the affidavit in the instant case satisfies *Aguilar's* first requirement of the test. The informant's information was based on personal observation and participation in the defendant's illegal activity. The neutral and detached justice of the peace could thus conclude that the allegations were based on facts, not suspicion or rumor. *Spinelli, supra*, 393 U.S. at 416, 89 S.Ct. at 589, 21 L.Ed.2d at 643.

We next consider whether the affidavit meets the second requirement of the test, that of credibility or reliability.

Where the accuracy of the information received from a confidential informant is not supported by other sources known or stated to be accurate or from corroborated facts known or discovered by the affiant personally or from other official or reliable reports, the officer-affiant must present in his affidavit a substantial factual basis for crediting the informant's story.

A mere allegation that the affiant has "received information from a reliable informant" has been held insufficient to show that the informant was credible, or that his information was reliable. See *Riggan* v. *Virginia*, 384 U.S. 152, 86 S.Ct. 1378, 16 L.Ed.2d 431 (1966) (reversing 206 Va. 499, 144 S.E.2d 298).

The most commonly accepted and approved allegation to substantiate reliability is that the informer is a person of known and proven reliability and has furnished information to law enforcement officers which has been instrumental in procuring convictions. But the credibility of the informer or the reliability of his information may be shown in other ways. Reliability may be found in an informant's statement of facts as an "eyewitness." *McCreary* v. *Sigler*, 406 F.2d 1264, 1269, *cert. denied*, 395 U.S. 984, 89 S.Ct. 2149, 23 L.Ed. 2d 773 (8th Cir. 1969). In *People* v. *Montague*, 19 N.Y.2d 121, 278 N.Y. Supp.2d 372, 224 N.E.2d 873, *cert. denied*, 389 U.S. 862, 88 S.Ct. 116, 19 L.Ed.2d 130 (1967), the reliability standard was said to have been met where the affidavit in sufficient detail established

of the house. Tr. 56, and that one of them, the one on the left, had the name Melvin Manley on it. Exhibit D-6, a photograph, showed that there were two mailboxes on the front of the premises. Tr. 61. Mr. Carter, the owner, stated that to his knowledge the name "Melvin Manley" had never appeared on the mailboxes. The petitioner, Melvin Manley, testified that his name had never appeared on any mailbox of the premises. Tr. 81. Further, he testified that he had lived all of his twenty-six years at 1012 Hanson Avenue, Norfolk, Virginia, and produced certain personal papers to corroborate this fact. Ex. D-7; Tr. 79.

After arriving at the premises, the officers went to the second floor, made an inquiry of someone, then returned to the first floor where they knocked on the door of apartment one. The officers presented the search warrant to petitioner who had answered the door, and they entered and searched the apartment. The tenant of the apartment, Carole Speller, was present at the time of the entry and search. During the search the officers discovered a quantity of what was later determined to be marijuana, however, nothing was found in the chest or dresser drawer specified in the affidavit. Tr. 56.

At the commencement of the trial in the Corporation Court, Part Two, counsel for the defendant moved the Court to suppress the evidence of marijuana on the grounds *inter alia*, that the affidavit upon which the search warrant was issued did not state sufficient facts and circumstances to support the informant's conclusion that marijuana was where he said it would be or that the informant was credible or his information reliable, and that the search warrant was invalid in that the apartment to be searched was not sufficiently described therein. Tr. 83-118. This motion was overruled by the trial Court and an exception was noted by counsel for the defendant. Tr. 123. Petitioner was convicted of possession of narcotics by the Court without a jury, §54-488, Code of 1950, 1967 Repl. Vol., and was sentenced to four years in the penitentiary and fined five hundred dollars.

The same grounds presented for review before this Court were raised before the Supreme Court of Appeals of Virginia which affirmed the judgment of conviction entered by the trial Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Virginia Supreme Court of Appeals conflicts with prior decisions of this Court establishing requirements for affidavits upon which search warrants are issued.

The issue petitioner seeks to bring before the Court is whether the second part of the two pronged test established in *Aguilar v. Texas*, 378 U.S. 108 (1964), that an affidavit must supply some support for the affiant's claim that the informant was " 'credible or his information reliable'," may be satisfied by a declaration against interest made by an undisclosed informant. The Virginia Supreme Court of Appeals held that the reliability standard of *Aguilar and Spinelli v. United States*, 393 U.S. 410 (1969) was met by an affidavit which related the informer's

> "participation in defendant's illegal activity. His statements were admissions against interest. These facts certainly show a substantial basis for the officer - affiant to state that the informant was reliable and for a neutral and detached magistrate to conclude that the informant's information was reliable and that probable cause existed for the issuance of the warrant." 211 Va. at 151.

While the Court in *Spinelli* indicated that there may be situations where the reliability standard is met by sufficient detail in the affidavit to establish that the information supplied by an informant was obtained in a reliable way, *Draper v. United States*, 358 U. S. 307 (1959), the Court did not suggest that reliability may be shown merely by the informant's admission that he participated in other illegal activities

with the accused in order to buttress his conclusion that narcotics were on the premises. This case is distinguishable from *Draper* where the reliability of the detailed information could corroborated at the scene of the arrest by the fact that the suspect was dressed precisely according to the description given by the informant. This sort of independent corroboration is impossible where the reliability of the information supplied by an informer may only be proved after the fact by conducting a successful search.

Petitioner challenges the Virginia Court's assumption that a declaration against penal interest is inherently reliable and that such a declaration is sufficient to satisfy the *Aguilar* test. Even assuming that such declarations by either the informer himself or a person making a declaration against interest to the informer are sufficient to establish the validity of the informer's conclusion that narcotics would be found on the premises, as Mr. Justice White indicated they would be in his concurring opinion in *Spinelli v. United States,* 393 U.S. at 425, this does not mean that the information is thereby rendered any more reliable, or the informer more credible. The Court has not spoken as to how a declaration against interest affects an informer's "credibility" as distinguished from his logic.

Petitioner urges that the declaration against interest in the present case is not inherently reliable, but, to the contrary, is inherently suspect when made by the informer and does not provide a sufficient substitute for independent corroboration of the informer's information or for evidence of his previous reliability. A declaration against interest is considered an exception to the hearsay rule because common sense indicates that a person would not untruthfully subject himself to possible punishment, ridicule or humiliation by admitting to criminal activity. Such declarations are considered trustworthy because there is some risk associated with making the statement. See: McCormick, Law of Evidence,

Handbook, §255, p. 549-551. This is not the case, however, where an informer's identity remains undisclosed. Such an informer risks nothing. Indeed, he may be motivated by the prospects of a reward or by ill will toward the accused. Without some corroboration or a past history of supplying reliable information, there is nothing to guarantee the integrity of an informer who bolsters his conclusion by bald assertions of criminal activity while completely insulated by his anonymity from any of the risks which render declarations against interest trustworthy.

This point should be reviewed by the Court because it is novel and it is extremely important to the administration of criminal justice. In addition, the Virginia Supreme Court of Appeals' decision is not in harmony with the requirements of establishing reliability and credibility set forth in *Spinelli* and *Aguilar*.

II. A search warrant is invalid where it fails to specify with certainty the place to be searched and resort must be had to sources independent of the warrant in order to ascertain with definiteness which portion of a building is to be searched.

Section 19.1-85, Code of Virginia, 1950, 1960, Repl. Vol., required the place to be searched to be described in the affidavit required preliminary to the issuance of a search warrant:

> ". . . an affidavit of some person reasonably describing the house, place, vehicle or baggage to be searched, . . . No search warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued."

The affidavit in this case did not specify the place to be searched with sufficient certainty. The affidavit merely referred to the apartment of Melvin Manley at 313 West 27th

Street. 313 West 27th Street is a residential building containing five separate apartment units. Tr. 64. The apartments are numbered and there is no apartment therein, or any portion of the premises that has ever been owned by or rented to a Melvin Manley. Tr. 67, 73.

In *United States v. Chin On*, 297 F. 531 (1924), a leading case, the Court stated:

> "This warrant, as I construe its slipshod language, authorizes the search of a room or rooms which were on the third floor of a building numbered 24 Liberty Street and were occupied by a person whose true name was unknown, but who was known as Fook Tsue Sung. On the testimony, he was a real person who occupied the next building, number 23 Liberty Street. He did not occupy the rooms searched. If both front and rear buildings be regarded as coming within the number, 24, which was on the front one, there were several rooms on the third floor. The warrant does not specify which of these is to be searched, except by the statement as to occupancy, which was entirely erroneous and of no assistance in locating them."

In State of *New Jersey v. Harold Ratashny*, 198 A.2d 131 (1964), a search warrant which did not specify properly and with certainty an apartment in a multi-apartment dwelling was held to be invalid. The Court stated:

> "We hold that where the premises reasonably believed to house illegal activities or know or reasonably should have been known by the police to be premises being utilized for the occupancy of more than one family, a search warrant must contain as specific a description of the particular area to be searched as the nature of the circumstances reasonably permit."

Petitioner submits that an affidavit failing to describe a portion of a multi-apartment building with more certainty then "the apartment of Melvin Lloyd Manley" is inadequate and void where it is demonstrated that it could not be determined whether an apartment in the building was rented or occupied by petitioner. The particular sub-unit of the building sought to be searched was not set forth with sufficient particularity to enable the searching officers to locate it without an independent investigation.

This issue should be reviewed because the search was improper and it is necessary to set forth further standards as to the specificity required in search warrants issued for multiple unit buildings.

CONCLUSION

The petition for writ of certiorari should be granted for the above reasons.

Respectfully submitted,

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APPENDIX

MANLEY v. COMMONWEALTH, 211 VA. 146.

Opinion.

Melvin Lloyd Manley, defendant, was convicted by the court of possession of marijuana, a narcotic drug, in violation of § 54-488, Code of 1950, 1967 Rep. Vol.,[1] and sentenced to confinement in the State penitentiary for a term of four years and fined $500. We granted defendant a writ of error.

At the commencement of the trial in the court below the defendant, by counsel, moved the court to suppress the evidence of the marijuana seized on the grounds that the affidavit upon which the search warrant was issued was based on hearsay information;[2] that the affidavit did not state sufficient facts and circumstances constituting probable cause for issuance of the warrant; and that the search of his premises and seizure of the marijuana violated the rights guaranteed to him by the Fourth Amendment to the Constitution of the United States. After hearing evidence, the trial court overruled the motion.

On July 11, 1968, at about 11:30 a.m., Detective R. H. Isaacs of the Norfolk Police Department obtained from a justice of the peace a warrant authorizing him to search the apartment of the defendant at 313 W. 27th Street in the City of Norfolk. Shortly thereafter Isaacs and another detective went to the defendant's apartment and served him with the search warrant.

There were five units in the apartment building, three on the first floor and two on the second floor. Defendant's apartment was on the first floor. Carole Speller, in whose name the apartment was rented, was also present when the officers entered the apartment. Defendant paid the rent on one occasion, and his name appeared on the mailbox.

Upon searching the front room of the apartment, Isaacs found a large quantity of marijuana in a cabinet and in a suitcase. Defendant volunteered the statement that Miss Speller had "nothing to do with it, it's mine."

The relevant portion of the affidavit on which the warrant was obtained reads as follows:

> "2. The material facts constituting probable cause for issuance of the search warrant. I have received information from a reliable informant who states that he was at the apartment of Melvin Lloyd

1. Now Code § 54-524.55, Acts of 1970, c. 650, at 1369.

2. This contention was later abandoned, it having been held in *Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), that an affidavit may be based on hearsay information.

Manley, 313 West 27th Street, this past week and he saw a large quantity of marijuana (a narcotic drug) in a chest in the front room and also some marijuana was in a dresser drawer in the middle room. My informer also states that in the past month he has smoked marijuana in the apartment * * * and in the past month he has made two purchases of marijuana from Melvin Lloyd Manley.

* * * * *

"4. Place to be searched: 313 West 27th Street, a dwelling. The apartment of Melvin Lloyd Manley."

Defendant now contends (1) that the trial court erred in admitting in evidence the seized marijuana because (a) the justice of the peace was without authority to take the affidavit upon which he issued the search warrant, (b) the affidavit did not state the underlying circumstances for the informant's conclusion that the marijuana was where he said it was and that the informant was "credible" or his information "reliable," and (c) the apartment to be searched was not sufficiently described in the affidavit and warrant; and (2) that the evidence was insufficient to support his conviction.

Section 19.1-85, Code of 1950, as amended, 1960 Rep. Vol., provides in part that no search warrant may issue until there is filed with the officer authorized to issue the warrant an affidavit reasonably describing the house or place to be searched and also alleging material facts constituting probable cause for the issuance of the warrant.

When the general laws relating to justices of the peace were revised and amended by Chapter 639, Acts of 1968, there was deleted from Code § 49-4[3] the provision for making affidavits before or administering oaths by justices of the peace. Thus defendant argues that since the justice of the peace was not authorized by statute to take the affidavit, the warrant was void, the search illegal, and the evidence obtained in the illegal search and seizure was inadmissible.

The question of the authority of the justice of the peace to take the affidavit was raised for the first time on this appeal.

[1] The Supreme Court of the United States recognized in footnote 9 of its opinion in *Mapp* v. *Ohio*, 367 U.S. 643, 659, 81 S.Ct. 1684, 1693, 6 L.E.2d 1081, 1092, 84 A.L.R.2d 933, 945 (1961), *rehearing denied* 368 U.S. 871, 82 S.Ct. 23, 7 L.Ed.2d 72 (1961),

3. The deleted provision was restored by Acts of 1970, ch. 783, at 1681. Obviously it was inadvertently deleted by Acts of 1968.

Constitution of the United States, Amendment XIV, Section 1:

". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

On July 11, 1968, at about 11:30 o'clock a.m. Detective R. H. Isaacs of the Norfolk Police Department obtained a warrant authorizing him to search the apartment of Melvin Lloyd Manley at 313 West 27th Street, in the City of Norfolk, Virginia, for narcotics. The affidavit executed by Officer Isaacs in relevant part reads as follows:

* * *

Melvin Manley

Affidavit for Search Warrant

* * *

2. The material facts constituting probable cause for issuance of the search warrant. I have received information from a reliable informant who states that he was at the apartment of Melvin Lloyd Manley, 313 West 27th Street, this past week and he saw a large quantity of marijuana (a narcotic drug) in a chest in the front room, and also some marijuana was in a dresser drawer in the middle room. My informer also states that in the past month he has smoked marijuana in the apartment of Melvin Lloyd Manley, 313 West 27th Street, and in the past month he has made two purchases of marijuana from Melvin Lloyd Manley.

3. What is to be searched for under the search warrant: Narcotic drugs.

4. Place to be searched: 313 West 27th Street, a dwelling. The apartment of Melvin Lloyd Manley.

Detective Isaacs
Affiant

11th July 1968"

The information contained in the affidavit was given to Officer Isaacs at about 11:00 o'clock a.m., on the 11th of July, 1958, by an informer known to Isaacs, but otherwise unidentified, over the telephone. Tr. 33. No information was recited in the affidavit to support the affiant's conclusion that the informer was reliable, nor were any corroborating facts or underlying circumstances furnished in the affidavit in order to establish the reliability of the information received from the informer.

Having obtained a search warrant based on the above affidavit Officer Isaacs and another detective went to 313 West 27th Street in Norfolk. They found the premises to be a five-unit residential apartment building. Tr. 64. The building was owned, as it had been for seven years, by Mr. and Mrs. Edward Carter. Tr. 65. During their ownership the units had always been rented out. All of the units are numbered, or are supposed to have numbers. Tr. 67. Apartment one, so numbered on the door, which has always been the case, Tr. 69, 70, is on the first floor of the building and to the left as one enters the main door to the building from the front porch. On July 11, 1968, apartment one was rented to Carole Speller and it had been rented to her for approximately three years. Neither apartment one nor any other apartment or portion of the premises had ever been rented to Melvin Manley at any time. Tr. 73.

Officer Isaacs testified that when he and the other officer arrived at the premises there were two mailboxes on the front

that the informer was speaking with personal knowledge and relating his own participation with that of the suspects in their illegal activities. In the concurring opinion of Mr. Justice White in *Spinelli*, 393 U.S. at 425, 89 S.Ct. at 593, 21 L.Ed.2d at 649, it is said:

> "* * * But if, for example, the informer's hearsay comes from one of the actors in the crime in the nature of an admission against interest, the affidavit giving this information should be held sufficient."

Here the affidavit established that the informant was stating facts based on his own personal knowledge and was relating his participation in defendant's illegal activity. His statements were admissions against interest. These facts certainly show a substantial basis for the officer-affiant to state that the informant was reliable and for a neutral and detached magistrate to conclude that the informant's information was reliable and that probable cause existed for the issuance of the warrant. Probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause.[4] Hence we hold that the reliability standard of *Aguilar* and *Spinelli* was met.

[4] Defendant says that since the identity of the apartment to be searched was not described with sufficient particularity, the affidavit and warrant were invalid. We do not agree.

Under the Constitution of the United States and the statutory law of Virginia it is essential to the validity of a search warrant that it describe with particularity the place to be searched. All that is required, however, is that the description be such that the officer charged with executing the search warrant can, with reasonable effort, ascertain and identify the place intended.

It has been generally held that a search warrant directed against a multiple-occupancy structure is invalid if it fails to describe the particular sub-unit to be searched with sufficient definiteness to preclude search of other units located in the larger structure and occupied by innocent persons. But there are exceptions to the general rule. Even though a search warrant directed against a multiple-occupancy structure fails to describe the particular sub-unit to be searched, it will ordinarily not be held invalid where it adequately specifies the name of the occupant of the sub-unit against which it is

4. *Beck* v. *Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142, 147-48 (1964).

directed and provides the searching officers with sufficient information to identify, without confusion or excessive effort, such apartment unit. See Annotation: "Search Warrant—Apartment or Room," 11 A.L.R.3d 1330, §§ 3 and 5, at 1333-39, 1340-41.

Here the affidavit and warrant gave the address of the apartment building and named the defendant as the person whose apartment was to be searched. The language used limited the search to the apartment unit occupied by the defendant. There were only five subunits in the entire building, and we think the apartment of the defendant was sufficiently described for the searching officers to locate it with very little effort.

Lastly, the defendant contends that the mere showing of the presence of marijuana in an apartment, which was occupied by another, is not sufficient to sustain his conviction. There is no merit in this contention.

The evidence shows that the defendant voluntarily stated to the officers that the marijuana found in the apartment was his, and that Carole Speller, who was present at the time of the search and seizure, had nothing to do with it.

For the reasons stated, the judgment is

Affirmed.

GORDON, J., concurring in result.

The majority concludes that an informer may be found credible or his information found reliable because he claimed to be an eyewitness or because his information was detailed. I do not so read the opinion of the Court and the concurring opinion of Mr. Justice White in *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). And I believe reason militates against such a conclusion.

I agree with the majority, however, that reliability in this case was sufficiently established by the informer's admission against interest. So I concur in affirming the judgment.